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December 8, 2004

Via Electronic Submission

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Notice of Ex Parte – Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,*** **WC Docket No. 04-313; CC Docket No. 01-338**

Dear Ms. Dortch:

On behalf of SBC Communications Inc. ("SBC"), I am writing to address recent reports suggesting that the Commission may adopt DS1 loop unbundling requirements on a building-by-building basis. According to those reports, the Commission is considering a proposal that would allow unbundling of DS1 loops in any building not already served by a provider that sells DS1 loops on a wholesale basis.[1] Alternatively, cognizant of the legal infirmities of a wholesale-only test, the Commission may be considering modifications to this test that would take into account alternative retail facilities to a particular building. For reasons we have already explained, such a test – whether or not modified – would be directly contrary to the Supreme Court and D.C. Circuit's decisions vacating the Commission's prior unbundling orders. Indeed, the Commission adopted a similar, route-by-route approach in the *Triennial Review Order*, and the D.C. Circuit ridiculed it as insensible. "Any process of inferring impairment (or its absence) from levels of deployment depends on a *sensible* definition of the markets in which deployment is counted," the court explained, and an approach based on competition on *individual* routes "simply ignore[s] facilities deployment along similar routes."[2]

The purpose of this letter, however, is not to reiterate the legal flaws with a route-by-route impairment analysis, but rather is to explain the difficulty of administering such a test. The record demonstrates that competitive carriers have lit more than thirty-one thousand buildings with their own fiber. The number is probably much higher, as the CLECs themselves have declined to reveal the number of buildings they serve with their own facilities. Be that as it may, the important point is that there is no reliable way for SBC to definitively identify the buildings CLECs serve with their own facilities, much less the specific services they provide in such buildings. SBC plainly cannot seek to enter and inspect every single business address in its territory to verify the existence or absence of competitive fiber. Indeed, even if SBC had the resources to undertake such a mind-boggling task, SBC would have no way

[1] *E.g.*, *Lobbying on Unbundling Rules Ratchets Up As Deadline Nears*, TR Daily (Nov. 30, 2004).

[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 574-75 (D.C. Cir.) ("*USTA II*").

of knowing exactly *whose* facilities were at what location, and *what services* were being provided over them. It is well established that an agency may not deny relief on the grounds that an applicant failed to prove a negative "with information unavailable to the [applicant]."[3] An unbundling test that imposes unbundling obligations based on competitive information that ILECs do not have and cannot reliably obtain would yield exactly that result.

It is no answer to suggest that the CLECs themselves – *i.e.*, those who have actually deployed facilities into a particular building – will have an incentive to publicize that fact, to make it more likely that they will win retail and wholesale customers. Any such suggestion rests on a fundamental misconception of how carriers compete in the market. Although it is true that, when CLECs enter a market – whether on a wholesale or retail basis – they typically emphasize the scale of their fiber deployment and the amount of traffic they carry on their own facilities, they do *not* identify exactly where those facilities are. That is because any such statement would also reveal where the CLECs have not deployed competitive facilities. The CLECs, in short, market themselves (accurately) as being able to provide service *everywhere* in a market, even where their facilities do not touch every building in that market. Any suggestion that they will tout the specific locations where they have deployed fiber is contrary to that basic fact, as the Commission itself has previously acknowledged.[4]

Nor is it an answer to suggest that the administrability problems endemic to a building-by-building approach could be solved by putting in place a CLEC "certification" process akin to the one the Commission put in place to guard against CLEC misuse of EELs.[5] In the EELs context, the criteria the Commission put in place were straightforward and, importantly, within the knowledge of the certifying carrier.[6] Indeed, the D.C. Circuit, in upholding the Commission's criteria, specifically rejected the CLECs' claim that obtaining information about their own traffic patterns was in any way difficult, emphasizing that "it is plain that supplying the information is feasible."[7]

In the loop unbundling context, by contrast, any CLEC certification process would be rife with opportunities for dispute and abuse. Thus, for example, if a CLEC is required to certify to the absence of a particular service offering over competitive facilities at a particular location, how is the CLEC to determine whether it can so certify? Presumably, the CLEC would be required to conduct some investigation of alternative facilities and the services those facilities are providing or are capable of providing. Otherwise, the certification process would be entirely meaningless. But, assuming that some investigation was required, what steps would the CLEC be required to take and what proof would it have

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[3] *Atlanta College of Medical & Dental Careers, Inc. v. Riley*, 987 F.2d 821, 830-31 (D.C. Cir. 1993).

[4] *Triennial Review Order* ¶ 321 n.948 (noting that "competitive carriers do not have an incentive to volunteer such information in our record").

[5] *See Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000), *petitions for review denied, Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*").

[6] Under the Commission's original EELs safeguards, for each "particular customer" the entrant wished to serve with the extended loop, the entrant was required to certify (i) that it was "the exclusive provider of [the customer's] local exchange service" and the circuit in question "terminate[d] at the requesting carrier's collocation arrangement in at least one incumbent LEC central office"; (ii) that it "handle[d] at least one third of the . . . customer's local traffic measured as a percent of total end user customer local dialtone lines" and "at least 50 percent of the activated channels on the loop portion of the loop-transport combination ha[d] at least 5 percent local voice traffic individually, and the entire loop facility ha[d] at least 10 percent local voice traffic"; or (iii) that "at least 50 percent of the activated channels on a circuit [we]re used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels [wa]s local voice traffic, and that the entire loop facility ha[d] at least 33 percent local voice traffic." *Id.* ¶ 22 (footnote omitted).

[7] *CompTel*, 309 F.3d at 17.

to offer that it had, in fact, taken those steps. Would it be under an obligation to search the premise to gauge the presence of competitive facilities, and to survey the tenants being served by those facilities or the owners of those facilities to determine what precise services were being provided over them? What if it were unable to conduct such a survey? What if it were unable to contact each and every fiber owner or tenant? What if it were unable to obtain such information because of the unwillingness of facility owners or customers to share sensitive information regarding the nature of their services being provided or used? Would the CLEC be able to certify under those circumstances? If so, on what basis?

Similar questions arise if the CLEC were required to certify that it cannot obtain service from a *wholesale* provider. In particular, how is the CLEC to determine whether there is competitive fiber in a particular building, who owns that fiber, whether the owner is providing wholesale service, and if so, at what level? What steps would the CLEC have to take to determine whether a wholesaler was willing to provide the service the CLEC sought even if the wholesaler was not already doing so in that building? Likewise, would CLECs be obligated to contact fiber wholesalers not yet connected to the building to determine if they were willing to provide the desired wholesale service in that building? If not, why not? If so, what steps would suffice? In addition, would the CLEC be entitled to UNEs if a wholesaler that relies on ILEC special access was offering the desired service in the building? Would the CLEC be entitled to apply self-serving screens – subjectively assessing, for example, the reliability of the wholesaler's network, the competitiveness of its price, or the adequacy of its OSS?

Questions such as these cannot be left in the hands of CLECs. Indeed, the records assembled in the states, in response to the *Triennial Review Order*'s now-vacated effort to adopt a building-by-building approach, confirms the practical impossibility of relying on CLEC self-certifications in this context. In the *Triennial Review Order*, the Commission put in place location-specific loop unbundling triggers that asked, among other things, whether competitive carriers were providing wholesale service to the location in question.[8] It soon became clear, however, that even those carriers that publicly advertised their wholesale last-mile facilities would resort to all manner of artifice to deny that those wholesale facilities counted for purposes of the Commission's test. Thus, for example, as SBC has already explained, AT&T relied on wordplay, contending that its wholesale "private lines" were not "loops" but "services," and thus did not count as a wholesale offering under the *Triennial Review Order*'s triggers.[9] Other carriers contended that, to count as a "wholesale" offering, the wholesaler's "loop" must provide a connection to the *incumbent's* central office, and that a wholesale loop did not "count" if it was connected to the *wholesaler's* switch (even if the wholesaler's network was interconnected with that of the incumbent).[10] One carrier even refused to disclose its own facilities on that basis, contending that its facilities were not "loops" because they ran to the carrier's own switch rather than to an SBC switch.[11]

In the same vein, carriers in the state proceeding raised a host of factual issues that they portrayed as "requirements" for a wholesaler, such as whether a given wholesaler's offerings were an "adequate" substitute for incumbent LEC facilities, or whether the wholesaler's operations support systems were

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[8] *See Triennial Review Order* ¶ 329.

[9] Alexander/Sparks Joint Decl. ¶¶ 26-31, 51-52, Attachment B to SBC Reply Comments.

[10] *E.g.*, SBC Comments Attach. A-TX Ex. 9 Part 16 (CLEC Coalition Br.) at 32; *see also* Alexander/Sparks Joint Decl. ¶ 53 (noting that AT&T had contended that its last-mile facilities were inferior because they connected directly to AT&T's network).

[11] *See* SBC Texas' Submission of Authority in Support of its Motion to Compel Against KMC, Texas PUC Docket No. 28745 (Jan. 16, 2004) (seeking to compel production in the face of claim that loops that did not terminate at an SBC central office did not count as loops).

comparable to the incumbent's.[12] One carrier witness claimed that a wholesaler must (i) be able to provision "reasonably foreseeable" quantities of loops, (ii) have "additional currently installed capacity" on hand, (iii) be ready to "immediately provision" loops, and (iv) be "reasonably expected to provide" loops on a "going forward basis."[13] Another carrier argued that a wholesaler should be "disqualified" if it did not provide a "guarantee" of repair or maintenance services.[14] That witness also claimed that an admitted wholesale provider should be eliminated because it provided IP services that allegedly could not be used for voice or PBX.[15] Carriers also contended that a wholesaler must offer service on a "common carrier basis" (that is, by tariff or standard contract) and that it be equipped to serve numerous customers.[16]

In short, the opportunities for abuse stemming from a CLEC certification requirement in this context are limited only by the CLECs' collective imagination. And the information necessary to test the CLECs' certifications – *i.e.*, information regarding exactly what facilities CLECs have deployed in what locations, and what services they are providing over those facilities – rests peculiarly in the hands of competitive carriers' themselves. In these circumstances, a building-by-building approach to high-capacity loop unbundling, even with a CLEC "certification" requirement, would be administratively unworkable and, as a result, unreasonable.

Sincerely,

/s/ Gary L. Phillips

cc: Michelle Carey
Thomas Navin
Russell Hanser
Ian Dillner
Jeremy Miller
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Scott Bergmann
Matthew Brill
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Linda Kinney
Jeffrey Dygert
John Stanley
Chris Killion
Jeff Carlyle

[12] *See*, *e.g.*, SBC Comments Attach. A-WI, Ex. 6 Part 9 (Alexander Reply (Loops)) at 10-12; *id*. Attach. A-IL, Ex. 6, Part 16 (Sparks Rebuttal (Loops)) at lines 697-699.

[13] Texas PUC Comments, Record Submission for Docket No. 28745, MCI Ex. 1 (Ball Direct Testimony) at 17.

[14] Texas PUC Comments, Record Submission for Docket No. 28745, AT&T Ex. 2A (Minter Rebuttal) at 15.

[15] *Id*. at 67-68.

[16] SBC Comments Attach. A-TX Ex. 9 Part 16 (CLEC Coalition Br.) at 32.